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THE NATURE AND IMPORTANCE OF LEGAL POSSESSION.

I.

THE careful student of our law of property needs no demonstration of the importance of legal possession. From before the date of the earliest year book the word *possession* and its synonym *seisin* have pervaded legal language and have signified matters of great consequence in the decision of cases. "In the history of our law," say Pollock and Maitland, "there is no idea more cardinal than that of seisin. Even in the law of the present day it plays a part which must be studied by every lawyer; but in the past it was so important that we may almost say that the whole system of our land law was law about seisin and its consequences."[1] The literature of the subject is extensive, and as much patient care has been devoted to its intricate details as to any legal matter. Briefly, the law of legal possession was and is the fundamental part of our law of property. Yet, before a critical student has ventured far into its mysteries, he will discover this marvelous paradox. In spite of its pervading importance and the accumulated learning of the

[1] 2 Pollock and Maitland, *Hist. Eng. Law*, (2nd ed.) 29.

"Possession is a conception which is only less important than contract. But the interest attaching to the theory of possession does not stop with its practical importance in the body of English law. The theory has fallen into the hands of the philosophers, and with them has become a corner-stone of more than one elaborate structure."—Holmes, *The Common Law*, 206.

"The law of property is based upon the two conceptions of ownership and possession." Lightwood, *Possession of Land*, 1.

"In order to ascertain what the right is, if any, which results from possession, it is necessary to enquire what that possession is which is recognized as having legal consequences. This, as Bentham says, 'is no vain speculation of metaphysics. Everything which is most precious to a man may depend upon this question: * * *'. The ascertainment of the nature of legal possession is, in fact, indispensable in every department of law. * * * It is therefore not surprising that the literature of the topic is a very large one, and its intricacies not a few * * *." Holland, *Jurisprudence*, (10th. ed.) 185.

"In order to understand our English ownership, we must understand our English possession." 2 Pollock and Maitland, *Hist. Eng. Law*, (2nd ed.) 28.

books, there seems to be no accepted common understanding of the meaning of *legal possession* or the nature of the thing or things denoted by the term. Indeed one of the endless controversies of "verbal jurisprudence" is tapped by that simple question:—What is *legal possession?*[2]

It is not within the scope of this article to offer a solution to the puzzle which will satisfy all reasonable criticism; nor to present even a brief digest of the law of possession. I shall explain my definition of the term, but I shall lay more stress on differentiating some of the principal sorts of things which are associated with the use of the term, on explaining the legal relations between these different sorts of things, on recounting some details of the law of legal possession which are not emphasized commonly by theorists and which logically necessitate a revision of the prevalent very vague, *a priori* ideas of "property," "title," and "ownership," on combating a popular notion in the profession that the law of seisin and disseisin rested only on feudal reasons and is practically obsolete, and on making clear the significance and elementary importance of a

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[2] "What is it to possess? This appears a very simple question:—there is none more difficult of resolution, and it is in vain that its solution is sought for in books of law; the difficulty has not even been perceived." Bentham, *General View of a Complete Code*, vol. III of Collected Works, 188.

"In the whole range of legal theory there is no conception more difficult than that of possession. The Roman lawyers brought their usual acumen to the analysis of it, and since their day the problem has formed the subject of a voluminous literature, while it still continues to tax the ingenuity of jurists. Nor is the question one of mere curiosity or scientific interest, for its practical importance is not less than its difficulty. The legal consequences which flow from the acquisition and loss of possession are many and serious." Salmond, *Jurisprudence*, 238.

By "verbal jurisprudence" I mean to indicate that familiar type of "science of law" which consist *principally* of the definition and differentiation of certain technical terms and the formal classification of certain *abstract concepts* of alleged importance in the law. For my criticism of this type of jurisprudence see 11 Mich. Law Rev. 1 and 109, 12 Mich. Law Rev. 1, and 9 Ill. Law Rev. 98.

I do not mean to imply that prevalent technical ideas and technical language never have a peculiar force of their own in the decision of cases which renders them worthy of special attention with reference to their concrete legal effects and possible consequences. The fallacy at which I am hitting lies in stressing the abstract and general ideas and expressions of legal thought as the essence of the law from which concrete judgments and other concrete legal consequences are supposed to be derived by processes of external application and deduction. "Verbal jurisprudence" selects from the great accumulations of this sort of sedimentary deposits, certain stock ideas and terms—many of them highly figurative, and some merely symbolic captions—classifies them, refines upon them, adds certain distinctions, explanations, corrections, and phraseology of its own, and offers the result as the necessary foundation of a scientific knowledge of the law. The law with which the lawyer deals professionally, does not consist in the forms of past thought and speech, but is a part of the activities and potentialities of the life of today. It is not a written record, but concrete fact and possibility. The records of the past may aid us in the arts of legislation, of administering justice, and of predicting and determining the law of the present and future; but they themselves are not the present law.

knowledge of the law of legal possession to all who would be thorough property lawyers. Incidentally, I intend to offer some views concerning the best content and arrangement of an introductory course in property law for students in our case-method law schools.

In discussions of legal problems, we continually meet with those difficulties of loosely used and vaguely defined ideas and terms, which are characteristic of the hasty, imperfect, and unsystematic perceptions and analyses of daily life. Ideas are tools with which intelligent consciousness vaguely grasps fragmentary impressions of the world without; language, spoken or written, is a common instrument of communication of consciousness; and our imaginations, or inner impressions, of spoken or of written words often are implements of thinking with which we adjust, marshal, parade, and employ ideas in articulate and coherent order. Language is at once a carrier and a clothier of ideas. Often it disguises them by figurative usage; often it confuses their similarities and individualities by uniforming several distinct sorts of ideas with the same term; often it veils thought into obscurity with vagueness; and sometimes there result travesties of logic. It behooves us then, to pay careful attention to the close relationship and interplay of language and ideas, and to guard against those subtle entanglements and delusions in which ideas and words, unwarily employed, only too often ensnare the thought of even able minds.

Particularly in connection with discussions of property law, we find abundant occasion for this sort of circumspection. Not only is the term *legal possession* an invitation to a puzzle, but other terms in constant use and the ideas which they serve to communicate seldom have been defined with clearness and accuracy. It is necessary at the outset of our discussion to examine three of these terms, common in legal speech and in the uncommunicated debates of thinking, and to note carefully certain important differences and relations connected with their use which are blurred quite frequently by hasty perception and the disguising uniforms of language.[3]

[3] I have found cropping out frequently in the conversation of students of law and in legal writings a fallacy which seems instinctive in human thought. That fallacy is that abstract legal terms such as those which we are about to consider must necessarily have a uniform inherent meaning which can be ferreted out by one expert enough and expressed in one or two sentences. To this, I think, we owe our common definitions of such words as *law, property, possession,* and *ownership.*

Any common word which is used to denote abstract, general ideas will be found, when concrete instances of its use are considered critically, to have no one narrow uniform meaning, but many meanings, some of which shade into each other almost imperceptibly, while others differ widely. The language of every day life is not a matter of scientific invention; it is the result of aimless and only slightly directed growth. Many of our legal terms are borrowed from the language of every day life and many of those which are peculiar to the profession, developed meanings under no more careful

The terms which our preliminary discussion will partially overhaul, are *property, title,* and *ownership*. The purposes of the discussion are two—(1) to notice some of the materially different sorts of things to which each term refers in actual use, and (2) to fix with reasonable definiteness the meaning which each shall have in this article. I do not purpose to record all the lights and shadows of meaning which the words have cast in technical use; nor to examine with critical nicety the vagaries of particular uses; nor to cite and investigate extensively individual instances by way of illustration; for I am not at present concerned with the matter of legal terminology except in a very incidental and subordinate way. I am concerned with re-outlining certain important distinctions of substance which common technical terminology tends to slur, and with freeing our debates from the dangers of this slurring. I wish to do this as directly and briefly as possible, and without involving us in a curious research into the use of terms. Therefore, in my discussion of meanings fixed by usage, I shall report briefly my own conclusions from experience of that usage and expect my readers to check the correctness of my report by their common professional knowledge.

Property, in a wide, very abstract sense, is a term to cover all things belonging to some person or persons. In technical use, however, it is applied only with reference to the belonging of things in a legal sense, and only to such things so belonging as are of a sort that usually is considered commercially wealth, however slight. One has a legal (as well as a moral) right to be free from wrongful assault; a legal right to the society of one's wife; a legal liberty, as a mem-

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and circumspect usage than that which is responsible for a non-technical word. We should not be surprised, therefore, to find that a great number of the words which we meet in our study of law, cannot be tied down to one clearly defined meaning. They have many meanings, more or less related, and it is necessary in any particular instance of use to determine carefully, by reference to the context, the exact idea which the word is intended to convey. Furthermore, lack of careful analysis of the matter discussed often will lead a writer or speaker to employ a word with only a vague concept of what he means by it. These statements are true of the four words that I have chosen for comparison. So commonly have these terms been used with different but related meanings, and so seldom has any discrimination been shown between these different meanings, that the task of establishing naturally obvious and important, but commonly slurred, distinctions is not an easy one.

I wish to emphasize as strongly as possible that we are concerned principally in ascertaining the natures of various different sorts of things of legal importance, and in distinguishing them. We are approaching the matter from the angle of terminology only because the terminology is confusing, and until that confusion has been cleared away, we can make little progress with our main theme. If, as is often the case, our preliminary word-definition involves incidentally a closer, clearer notice of related material things and differences, which otherwise easily might have been slurred or overlooked entirely, this will be an added benefit of more permanent importance than the clarification of transient terminology.

ber of the public, to walk down a public street; a legal capacity (if he is sane and of sufficient age) to enter into binding contract obligations; but these legal things are not property in the technical sense of that word, because they are not things upon which an exchange value usually is put. They are not usually considered wealth in the commercial sense of the word.[4]

Things which are labeled *property* in the technical sense may be grouped primarily into two quite dissimilar categories, which it is important to distinguish in the interest of clear thinking. The word *property* is used to denote physical objects of property *rights,* such as land, horses, furniture, and grain. It is also used to denote property rights, etc. themselves. An automobile is a tangible object with respect to which property rights, etc. may exist. Neither the automobile nor the use of it are legal phenomena independently. They are things concerning which legal rights and liberties "exist," but they themselves are not the direct products of the law-making agencies of government. On the other hand, the legal rights and liberties of the owner or of the possessor of the automobile are technical legal things, whose "existence" is essentially the direct product of governmental activities. They are not physical objects like land or a chattel. Nor are they merely intangible mental things—*a priori* postulates from which legal decisions are produced; nor are they preexisting external causes of legal remedies; nor are they figments of the imagination. They consist in the availability of legal remedies to the owner or possessor against others who interfere unlawfully with his use and control of the automobile, and in the potential refusal of legal remedies in favor of others against him for his use and control of it. They are very practical and important things whose scope, definition, creation, extinguishment, "transfer," and "transmission" are matters for the professional skill of the lawyer to ascertain and provoke.[5] They are called *property* because they

[4] "In its widest sense, property includes all a person's legal rights, of whatever description. A man's property is all that is *his in law.* This usage, however, is obsolete at the present day, though it is common enough in the older books." Salmond, *Jurisprudence,* 391.

[5] "It is conceded that some little confusion exists with respect to the use of the expression, 'physical injury', in connection with the term *property;* but it is believed this arises mainly from the ambiguous character of the latter term, and doubtless all the apparent conflicting expressions to be found in the opinions of this court upon this subject may be harmonized upon the theory that the term property, in that connection, is used in different senses. Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the constitution; yet the term is often used to indicate the *res* or subject of the property, rather than the property itself, and it is evidently used in this sense in some of the cases in connection with the expression physical

are things of pecuniary value which *belong* to the possessor in the sense that he may exercise them. The automobile, a physical object, the control and use of which are valuable, is called *property* technically because it *belongs* to the owner in the sense that his legal rights and liberties with respect to it, figuratively speaking, give him legal control of it.

Property rights, liberties, powers, etc. are of many sorts. Some are rights, liberties, etc. with respect to certain physical objects. Some have no relation to any certain physical object. For instance, a legal right to payment of a debt of $100 from X, is a *property right.* It constitutes part of the assets of its owner. But it is not a right relating to any particular material object of property. Payment may be made at maturity in any legal tender currency. Property rights, liberties, etc. which do relate to definite physical objects are of many sorts. Some are rights and liberties incident to legal possession of land (such as are included in a present estate in fee or for life, or a tenancy for years or at will) or of a chattel; some are incorporeal rights, liberties, etc., such as an easement over land; some are lien rights, etc.; some are rights, liberties, and powers to get back legal possession of land or of a chattel held adversely; and there are other sorts.

Now these distinctions doubtlessly are obvious enough. There is nothing cryptic about them. They lie on the surface and require for perception only eyes and attention and elementary legal training. Yet they are ignored quite commonly, often even by learned property lawyers, and habitual legal language encourages confusion of them. Thus we find land, tenements, heriditaments, chattels, and choses in action, all classified as property indiscriminately, as though they were similar things. We speak of "transferring *land*" when we mean "transferring" or creating *a legal estate in the land;* we speak of land being *real property* and chattels being *personal property,* when we mean that certain sorts of *interests in land* are *real property,* and that *interests in chattels* are *personal property;* we class personal obligations, chattels, and terms for years in land together as *personal property,* whereas, if we would have our classes congruous and our language unmistakable, we should substitute for *chattels, property rights, etc. in chattels;* we call a term for years in land a *chattel interest* or a *chattel real,* when we mean that it is a

injury, while at other times it is probably used in its more appropriate sense, as above mentioned." Mulkey, J., in *Rigney v. Chicago,* 102 Ill. 64, at p. 77.

See also and compare remarks of Smith, J., in *Eaton* v. *Boston, Concord & Montreal R. R.,* 51 N. H. 504, 511; Finch's *Cases on Property in Land,* 1, 3; of Selden, J., in *People* v. *Toynbee,* 13 N. Y. 378, 433; and of Sloss, J., in *Pac. Tel., etc. Co.* v. *Eshleman,* 166 Cal. 640, 699.

personal property interest in land, although the lessee may recover possession of the land in an action at law if it is held adversely to him during the continuance of the term; we speak of a fixture being annexed to *the realty,* when we mean annexed to the *land,* which is the object of *property rights, etc.* both real and personal; we find frequently a statement that "riparian rights are part and parcel of the riparian land," whereas the meaning is that riparian rights, etc., as long as they endure unextinguished and unsuspended, are inseparable incidents of *legal possessorship of the riparian land.*

I do not wish to be hypercritical of such phrases. The definition of legal terminology is not a matter of law, but of language. It depends upon usage, and not upon judicial or legislative fiat. No sound criticism can be passed on a choice of language in communication on legal matters, except for reasons which are sound for linguistic criticism generally. Short cuts in speech are valuable economies and the stimulation of figurative speech is beneficial to thought, if they do not mislead or confuse; and these sorts which I have mentioned are objectionable only insofar as they are induced by confusion or vagueness of perceptions, or tend to mislead, confuse, or perplex. It is essential, however, that we notice attentively the material distinctions which I have stressed and be circumspect concerning our ideas and language, for if one enters as tangled a field of study as that of legal possession, with eyes blurred to a difference as patent as that between a cow with horns, hoofs, and tail and a legal property right, he is heavily handicapped at the outset of his venture.

In the interest of clearness and economy of communication in this article, let us adopt the following terminology. Let *property* mean legal property rights, liberties, powers, etc.; *property object* mean a physical thing concerning which property rights, etc. exist; *land* have its popular significance, and cover, additionally, all vegetation and all "improvements" which for the legal purposes of the case in hand are treated as part of the land; *chattel* mean a property object other than land; *real property* or *realty* mean a property interest (*i. e.* legal rights, etc.) belonging to a category which we shall not now seek to define, (except to say that it does not include interests in chattels nor interests for years nor at will, nor lien rights in land), since our present purposes do not demand a definition, and to do so would necessitate an extended discussion; and *personal property* or *personalty* be a label which may be attached to any property interest not qualifying for the badge *real property.*[6]

[6] The word *property* often is used with a more limited specialized meaning. It often is said that X has "the property" in a chattel or a piece of land and that Y has only a lien on it. Using *property* in the larger sense, it might be said that Y has

Title is another troublesome word.[7] Its classical technical meaning is simple enough. In this sense a title is the set of facts upon which a claim to some legal right, liberty, power, or legal interest is based.[8] Thus if A promises B in writing to transfer and deliver to B a thousand bushels of wheat at a certain time, and B pays A for the promise, a property right arises in favor of B against A, which we call a *legal obligation.* B's title to this obligation consists, abbreviately, in the facts of the written promise by A, the payment of consideration by B, and the facts establishing their respective legal capacities to enter into a binding obligation. If X takes a valid patent from the federal government to federal lands, and the lands are not occupied adversely to him, X has a fee simple estate in the lands. His *title* to that estate—*i. e.* his *title* to *its present existence* in his favor—consists of the facts which established power in the federal government to create that fee and the existence of the federal land laws under which the patent was issued, the facts of correct issuance of the patent, and the fact that no one is occupying the land adversely to him. If X executes and delivers a deed to E of a right of way across the land, E becomes possessed of an ease-

property in the chattel or the land also. He has rights, etc., in the chattel or land, perhaps appurtenant to a chose in action, which are of commercial value. These rights, etc., may be labeled *property* correctly. When it is said that Y has not the *property* in the chattel, it is evident that the word *property* is used in a narrower sense to designate what we may vaguely describe, but adequately indicate as the "general property." This phrase frequently is used in connection with cases such as I have mentioned here in the sense of the vested fee simple estate in land or the similarly extensive vested interest in a chattel.

Again, the word *property* sometimes is used with the meaning which I indicate by the word *ownership* or by the phrase *legal power to hold or to get and to hold the property interest in question against other litigants generally.*

See a brief discussion of different meanings of the word *property* in legal speech:—Reeves, *Real Property,* vol. 1, § 2.

"As to *property,* though throughout the middle ages the French and Latin forms of this word occasionally occur, and the use of it is insured by the writ *de proprietate probanda,* we believe that until the last century it was far less frequent than would be supposed by those who have not looked for it in the Statute book. Instead of *property* in the vaguer of the two senses which it now bears, men used *possessions* and *estate.* In a narrower sense *property* was used as an equivalent for best right (e. g. Co. Lit. 145b: 'But there be two kinds of properties; a generall propertie, which every absolute owner hath; and a speciall propertie'), but in the Year Books it is by no means common." 2 Pollock and Maitland, *History of English Law* (2nd ed.) 153, note.

On the difficulties of defining accurately the terms *real property* and *personal property,* see an article by Mr. T. Cyprian Williams in IV Law Quart. Rev., 394 et seq.

[7] If one has any doubt either as to the vagueness or the variation of the meaning of the word *title* in general use, he can dissipate it speedily by referring to 8 *Words and Phrases,* 6979 et seq.

[8] "The title is the *de facto* antecedent, of which the right is the *de jure* consequent. If the law confers a right upon one man which it does not confer upon another, the reason is that certain facts are true of him which are not true of the other, and these facts are the title of the right." Salmond, *Jurisprudence,* (2nd ed.) 303.

ment. His *title* to the easement consists in the facts of X's *title* to his estate, plus the execution, delivery, and acceptance of the deed. If X dies intestate, and the land is unoccupied, his heir at common law immediately becomes seized "in law" of an estate in fee simple in succession to X. His full *title* to this estate consists in the facts which constituted X's title, plus the facts of X's death intestate and those establishing his heirship to X and the absence of adverse possession. If an adverse claimant, Y, enters on the land and occupies it, claiming it as his own, X's heir has certain remedies to recover the *estate* from which he has thereby been "ousted." His *title to these remedies* consists in the facts which formerly constituted his title to the status of a holder of a fee simple estate, plus the fact of the adverse entry, occupancy, and claim against him. If X's heir neglects to pursue his remedies for the period of the statute of limitations, being under no disability, and the adverse possession of Y continues against him without interruption throughout the period, these facts, added to the facts of the original disseisin and the existence of the statute, will constitute a good bar to the attempt of X's heir to recover his lost estate by action or rightful entry. They constitute a *good title* in Y, the adverse claimant, *to hold seisin of the land in fee simple against the attack of X's heir.*

But *before* the statute ran in his favor, Y had certain possessory rights, liberties, etc. with respect to the land as against everyone excepting X's heir, and to some extent even against him. His *title* to these rights, liberties, etc. consisted in his adverse occupancy plus his openly indicated adverse appropriation intent. Furthermore, if before the statute had run in Y's favor, Y had been ousted by Z, Y might have recovered the land from Z in ejectment or by a proper re-entry. His *title to these remedies* as against Z, would have consisted in his prior adverse occupancy and adverse appropriation intent, plus the ouster and the continued adverse holding by Z, and the fact that Z could show no *valid title in defense of his entry.*[9]

On the basis of the legal facts recounted above, it is clear that *title,* in this technical sense, always is a relative matter. When a question of *title* is at issue, clear thinking requires that we answer the questions: (1) Title to what definite legal interest, remedy, or defensive power? (2) Title in favor of whom? (3) Title against whom? Also a title may be good or bad for a certain purpose, and a title which is good to maintain one sort of claim or defense against Z, may not be good to maintain a different sort of claim or defense against him, and may not be good to maintain any claim or defense

[9] The law indicated in this paragraph is discussed later in this article.

against X. When the word *title* is used in this technical sense without express qualification, it generally is understood tacitly that *good* (*i. e. efficient*) title to the interest indicated by the context is meant.

This, I think, is the most common, and certainly it is the most useful significance of the word *title*. It is the sense which will be given it in this article. Unfortunately for the interests of clearness, however, it sometimes is used also in the sense of *legal right* or *legal interest*. Its use in this sense illustrates the curious slipping tendencies of ideas and language; for here the mind slips easily from *the factual basis of the claim* to the idea of *the entitled legal right or interest* and, perhaps confusing the two dissimilar things, applies the term *title*, by a metonymic extension, to the right or other legal interest. This slipping is encouraged by another distinct use of the word *right* in legal discussion—its use in the common abstract sense of *proper, correct*, or *satisfying some test*. In this sense the man who has *good title* to the "right of action" or to the defense which he claims, is legally *right* in his claim, or has legal *right* on his side—i. e. his claim is sound legally; his *title* is legally sufficient. Probably this very frequent meaning of the term *right* both in legal and in popular speech is as powerful an ally as any other external cause to a muddle of ideas concerning the nature of legal rights, liberties, etc. and a lack of perception of the many different meanings which the word *right* bears in legal discussion. Certainly the confusion of *good title* and *legal interest to which the title pertains* is furthered also by the common fallacy that so-called substantive rights are entities not only distinct from, but independent of, legal remedies and that legal remedies are given in vindication of them. To one who is imbued with this fallacy, it would not seem illogical to think of substantive rights as the things which entitle their holders to the vindicatory remedies; and hence may arise, consciously or unconsciously, a confusion of a valid claim, including its factual basis—its title—, with the legal rights, etc. to which it pertains.

Clear instances of this confusing use of the word are hard to establish, since in the case of such an expression as "X has the legal title to the chattel," ordinarily it is not clear whether the speaker or writer has used an ellipsis and means that X has good title, in the primary technical sense, to the general property rights, etc. in the chattel and therefore *prima facie* possesses those rights, etc., or simply and directly that X possesses the general property in the chattel. However, I have known of strenuous and insistent arguments by capable students of the law that a *legal title* consists of a legal right, or of a mass of legal rights, etc., and that any other use

of the term is reprehensible. It is necessary, therefore, to define what we mean by the term and to interpret its use by others with discrimination.[10]

Now a word about *transfers* and *transmissions* of *titles*. If X has a fee simple estate in land, whether he holds that estate tortiously or under good title as against the whole world, he may "transfer" his estate *and his title* to another by a proper legal instrument. Of course nothing literally passes from X to his transferee by the transfer excepting the physical document of "transfer." When we say that X has "transferred" his fee simple, we mean to indicate that, through the operation of the instrument of transfer, the fee simple rights, liberties, etc. in favor of X have been extinguished and similar ones have been created in favor of his transferee. If we say that X has "transferred the land in fee simple," we mean the same thing. When we speak of the "transfer" of X's title, we mean primarily and technically that, because of the execution of the instrument of "transfer," the transferee can now avail himself of the facts which constituted X's former title plus the instrument of transfer to make out a title in himself as effective legally as that which X had. Secondarily we may mean that X has "transferred" his fee because he has "transferred" his title to it. Similar statements are applicable to the case of a so-called *transmission* of title and the related rights by intestate succession.

To reiterate, we should bear in mind throughout discussions of property law (1) the distinction between property rights, powers, liberties, and other interests and the investitive facts which are the cause of their predication; (2) the relativity of title and the conse-

[10] Consider, for instance, the expression, common in discussions of problems in the law of trusts and of the equitable relations of vendor and purchaser of interests in land, that X "has the bare legal title." Is this an abbreviated expression for "X has the legal title to the bare legal interest," or has the word *title* slipped over to the meaning *legal interest* or *rights, etc.*, by a sort of unconscious metonymy?

"The case of *Mitchell* v. *Cline*, supra, was a case where, after a patent, a suit for partition was instituted, and it was sought to charge one of the entrymen, as trustee for the benefit of the others, as to a portion of the title." Parker, J., in *Riverside Co.* v. *Hardwick*, 120 Pac. 323.

See Austin, *Jurisprudence* (5th ed.) 874, 884, 963, 973, 976, 977.

"This is but the common basic rule of the law of pleading applicable to declarations and other pleadings, 'that the pleadings must show title'—not title in the common-speech meaning (that is, deeds or other muniments of title), but their results, the right flowing from them, the right, estate, or property interest wherein the party has been harmed" Brannon, J., in *Clay* v. *Albans*, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883.

"No possessory action between persons in any court of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession." Rev. Stat. U. S. § 910; U. S. Comp. St. 1901, 679.

quent necessity of determining exactly the thing to which title is predicated, against whom and in favor of whom it is predicated, and whether it is good or bad; and (3) that upon effectual "transfer" or "transmission," figuratively speaking, there is a "transfer" or a "transmission" of the legal interest and also of the availability of the title of the transferor or intestate to that legal interest.

Concerning *ownership* I wish to say very little. Its meaning is most indefinite, independently of clarifying context, and of the three words it is of the least technical value. Indeed, it has been said that *owner* is a term of popular speech and not at all a technical one.[11] *Ownership,* of course, is the state of being *owner*—of *owning*. One *owns* in a legal sense that which in a legal sense belongs to him. In what does this legal *belonging* consist? No arbitrary answer will suffice as a determination of the meanings fixed by usage. It behooves us, therefore, to frame our reply with constant reference to our common knowledge of this usage in a few type applications.

Certainly we would be justified by usage in saying that any particular legal right, power, liberty, or bundle of multitudinous rights, etc. constituting an estate in land or other legal interest, which one possesses under good title and does not hold for the benefit of anybody except himself, *belongs* to him legally or is *owned* by him. Thus, if A legally owes B for B's own use $100, it is correct language to say that the obligation running to B is *owned* by B. If B has a life estate in certain land in present possession, reversion, or remainder, by good title, he *owns* that life estate. If B holds by good title an easement across A's land, B *owns* that easement. If B is bailee of a chattel for his own benefit, he is *"owner"* of the bailee rights, liberties, etc. They belong to him.

If any legal rights, liberties, etc., are held for the benefit of another, we are not as assured in calling the holder the *owner* of them. The beneficiary, of course, may be called *owner* of the beneficial rights, liberties, etc. which he can exercise himself, but so untethered is usage that it frequently calls him *owner* of the quite distinct legal rights, liberties, etc. which are held and exercisable for his benefit by the fiduciary. For instance, a *cestui que trust* is, of course, designated the *owner* of the specific equitable and legal rights, liberties, etc. which are available to him personally; but frequently he is also said to be the beneficial *owner* of the legal estate or other interest which is held by another for him. It is said to *belong* to him beneficially because it is to be exercised for his benefit and not for the benefit of the holder. On the other hand, without straining the

[11] See: 28 *Am. and Eng. Ency. of Law* (2nd ed.) 233 et seq; *Miller* v. *Imperial Water Co.,* 156 Cal. 27, 30, 103 Pac. 227, 229.

elastic bonds of usage, it may also be said that a trustee is *owner* of the legal estate or other interest which he holds in trust—not a beneficial *owner,* but an *owner in trust* for another.[12] Certainly strictly speaking the rights and liberties which he possesses are not possessed by anyone else. In this sense they necessarily *belong* to him and to no one else, although he holds them in trust for some one else's benefit. In other words, usage has made *owner* to some extent a synonym for *legal possessor.*

The word *owner* is applied not only with reference to legal rights, etc. as the property things *owned,* but often also with reference to physical *property objects*—i. e. land or chattels. What is its significance in this connection? What is meant by an assertion that A is the legal *owner* of a certain chattel or of a certain piece of land? If there is no adverse possession or fiduciary possession of the land or chattel, we mean by the *owner,* used without expressed or implied qualification, the one who has the so-called *general property* or *general dominion* in the thing—the fee simple interest in the case of land; the corresponding "absolute" or indefinitely transmissible interest in the case of a chattel.[13] But suppose the person who holds such an interest in the thing at present, does so tortiously—i. e. as a disseisor—on whom would the label *owner* fall—on him, or on the person who has good title to recover and hold the thing, and to revest and maintain the fee or equivalent interest as against everyone? We shall find that the disseisee has a mere chose in action. Undoubtedly no one but he could be called *owner* of that. The disseisor, however, legitimately may be said to be the *owner* of the interest which he holds, if we confine *own,* in this connection, to the meaning of *legally possess.* In the sense that the adverse claimant is "dominus" of the land or chattel at present, holding, although tortiously, a fee simple or general property interest, he may be called owner of the land or chattel, for in the sense that he possesses it, it *belongs* to him; but in the sense that the "best title holder" has *good title to recover in litigation a fee simple or general property* in the object and to hold it against all, he may be called legitimately the *owner* of the thing

[12] "The *cestui que trust,* though spoken of as the owner of the land, and though, as regards his right of beneficial enjoyment, he is in effect the owner, has not, strictly speaking, proprietary rights therein. * * * Accordingly, the trustee, as the owner of the trust property, and not the *cestui que trust,* is the proper party to bring suit against third persons in regard to the property * * *." Tiffany, *Real Property,* 219, § 91.

[13] "So long as we remember that the ownership of a material thing is nothing more than a figurative substitute for the ownership of a particular kind of a right in that thing, the usage is one of great convenience; but so soon as we attempt to treat it as anything more than a figure of speech, it becomes a fertile source of confusion of thought." Salmond, *Jurisprudence,* (2nd ed.), 224.

or of a fee simple or general interest in it, for in this ultimate "justice done" sense, it belongs to him.

This discussion of the meaning of *owner, own,* and *ownership* is not thorough or comprehensive, but it suffices, I think, to show the difficulty of forcing a preferred, narrowly limited definition upon a careless, ingenious world of talkers. Cloistered pedantry may plead for a close clipped, square cornered, well fenced usage with earnest precision; but the million heedless tongues will wag, vivid imaginations will slip unconsciously into metaphor—that sad traducer of words—, and the rapid impatience of thought will not stay its course to ascertain and suffer confinement in the rigid limits of a dogmatically prescribed terminology. Healthy language is essentially wayward. It becomes atrophied with rigid discipline and confinement. Therefore it seems to me much more profitable to insist upon the perception of substantial distinctions and upon adequate clearness of thought and communication, than to enter into lengthy and uninteresting debates with the futile purpose of tethering particular words to narrow, technical, autocratic definitions. If we each understand economically what the other means, why waste time quarreling over the means by which our understanding has been accomplished?[14]

For the purpose of this article let us use the word *owner* to designate him who has good title, when in legal possession of a property thing, to hold it in litigation against all the world, and when out of legal possession, to recover legal possession and then hold it against all the world. This definition will suffice whether the "thing" is a *property object* or a *property right or interest;* and, although perhaps I have clothed it in unfamiliar verbiage, will be found upon

[14] One may narrowly and clearly define a word for his own use and consistently employ the word according to his definition; but to try to force that peculiar definition on others, when the word belongs to the vocabulary of every day life, is a foolhardy undertaking. To declare that all other uses are erroneous, is the height of egotism. To insist upon interpreting the speech or writings of another according to the preferred definition, and then to quarrel with the result of this misinterpretation is the acme of blind mental perversity. Language is merely an instrument of communication. We may criticise the instrument employed in a particular case as inefficient; but if the hearer understands the speaker the purpose of language is attained. Language has nothing to do with logic except to carry and express thought. Why then, when we are discussing law, or philosophy, or music, or art, or any other external phenomena, should we stop by the wayside to quarrel over terminology when meaning is clear? I am not advocating in this article any particular system of terminology. I propose:— (1) to distinguish certain legal matters, not merely verbal, but substantial, and (2) to distinguish certain common uses of the legal terms which I have chosen for discussion. If anyone objects to calling things by the names I may choose to apply, I am perfectly willing that he shall substitute his own terms, providing he does so with discrimination for substantial distinctions. I wish to lay stress on the substance of the law, not on the means of expressing it.

closer acquaintance to conform with a common usage.[15] If *ownership* is predicated of a physical object without express or implied qualification, let it be understood that this is an ellipsis for *ownership of the fee simple* or *general property interest* in the object.

Now, what is legal possession? It may aid our inquiry to notice a common mistake of writers on "verbal jurisprudence." They assume that the nature of legal possession is to be determined by abstract and generalized definition of the word *possession;* that certain sorts of legal effects normally are associated with certain sorts of facts indicated by the term; and that these effects and facts are thus associated because the facts answer the test of the proper abstract definition. Therefore they begin by evolving *a priori* from their knowledge of the word *possession,* specially checked and limited by the occasions of its technical legal use, a set of abstracted conceptual elements, which is offered as the universal ideal meaning of the term. Commonly two principal elements are prescribed: (1) "an intent to control," or "an intent to appropriate to oneself the exclusive use of the thing possessed," or "an intent to exclude others" or "an intention to possess"; and (2) "an actual control," or "a power of control," or "a power to exclude others," or "a power of using to the exclusion of others," or "an apparent power to control," or "an apparent power to exclude others." The first of these elements is called the *animus possidendi* and the second the *corpus possessionis;* and usually both the definitions and the phraseology of their expression are modeled directly or indirectly upon interpretations of Roman Law texts.[16]

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[15] This is certainly the sense in which Maitland uses the term. See Maitland, *The Beatitude of Seisin,* IV Law Quarterly Rev. 24.

Compare:—"But what are the rights of ownership? They are substantially the same as those incident to possession. Within the limits prescribed by policy, the owner is allowed to exercise his natural powers over the subject-matter uninterfered with, and is more or less protected in excluding other people from such interference. The owner is allowed to exclude all, and is accountable to no one. The possessor is allowed to exclude all but one, and is accountable to no one but him." Holmes, *The Common Law,* 246.

Also compare Markby, *"Elements of Law,* (6th ed.), 157 et seq.

"As to the words *owner* and *ownership*:—Dr. Murray has kindly informed us that the earliest known example of the former occurs in 1340; Ayenbite of Inwyt, p. 27 * * * * 'Of *ownership,* * * * * we have no instance before 1583.' * * * * So far as we are aware, the term *absolute ownership* was very new when Coke thus applied it to the tenant in fee of English land. In the past the place of *owner* and *ownership* seems to have been filled in common discourse by such terms and phrases as 'possessor', 'possessioner', 'he to whom the thing belongs or pertains', 'he who has the thing'. * * * * The things that a man owned were often described as his *possessions.* This usage of *possessiones* is very ancient; witness Paulus, Dig. 50, 16, 78; it runs through the middle ages." 2 Pollock and Maitland, *History of English Law,* (2nd ed.), 153, note.

[16] "It is to be noticed that there are not two *ideas* of possession—a legal and a natural. Were this so, we could dispense altogether with the discussion of possession in

Naturally these *a priori* definitions will not pass the test of actual usage of judges and lawyers without further explanation. In many cases *possession* exists in X according to the definition, but "the legal effects of possession" do not result to X, and the judges say that X has not *legal possession.* In other cases where one or both of the essential elements stipulated by the definition are lacking in X's favor, X is adjudged and called *legal possessor.* Usually these cases are accounted for by the theorists as exceptions, due to some particular juridical policy or consideration, to historical accident, to the unsystematic courses of juristic development, or to a judicial error. Cases where X is adjudged *legal possessor* although the definition refuses him "possession," are labeled cases of "constructive possession" or "fictitious possession."

Since these definitions do not meet the test of actual usage, they do not satisfy the critical student of the concrete details of property law. They leave his puzzle as much of a puzzle as ever. In fact they glaze and harden the difficulties instead of solving them, because they incrust them with a plausible linguistic argument founded on *a priori* premises. The fault lies in the method of attacking the problem and, back of that, in a very common fundamental fallacy which treats abstract ideas, generalizations, and the language in which they are expressed, as the essential enduring substance of the law instead of only transitory, subordinate implements of technical thought and communication. What is a proper method?

The law—that is the field of legal study—is like the fields of most other sciences in that it consists of sequences of concrete phenomena external to the mind of the investigator and the possibilities of future sequences. Prominent among the phenomena of the law are (1) occurrences of the sort that give rise to "cases," (2) their consequences leading through legal procedure and the operation of courts and the other law-determining agencies of government, and (3) the collateral contributing causes of those consequences. The

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fact. There is only one idea, to which the actual rules of law do more or less imperfectly conform. There is no conception which will include all that amounts to possession in law, and will include nothing else, and it is impossible to frame any definition from which the concrete law of possession can be logically deduced. Our task is merely to search for the idea which underlies this body of rules and of which they are the imperfect and partial expression and application." Salmond, *Jurisprudence.* (2nd ed), 240.

"It follows from this discordance between law and fact, that a complete theory of possession falls into two parts: first an analysis of the conception itself, and secondly an exposition of the manner in which it is recognized and applied in the actual legal system. It is with the first of these matters that we are here alone concerned." Salmond, *Jurisprudence,* (2nd ed.), 240.

See also Holland, *Jurisprudence,* (10th ed.), 185-186.

operations of the law-determining agencies include the thinking of the judges, the expression of their opinions, and all the details of procedure, trial, argument, etc. The collateral concrete causes include legislation, customs, precedents and other authorities, common ideas, beliefs, superstitions, influences of all other sorts, etc. From the field of law must be distinguished carefully (1) thinking and knowledge concerning that field and (2) the expression of that thought and knowledge. The official opinions of judges are important indications of the causes of their decisions and have weight as precedents; but they are not necessarily accurate or clear expressions of the processes of decision nor of the antecedent causes of the decision; nor do they express *authoritative* abstract generalizations of the law in any other sense than that the generalized statements may have precedential weight in the determination of future cases.[17] In the investigation of a problem such as ours, the first requisite is to understand thoroughly the concrete occurrences and their legal consequences which are within the scope of the problem, and this understanding must include knowledge of what particular antecedent facts are responsible for particular decisions—for instance concerning possession—which the courts make. Such knowledge is not always to be obtained by reading and interpreting abstractly the opinions of the judges, for judicial reasoning, like other human reasoning, is largely instinctive, and judicial analysis and exposition are not immune from fallacies, inaccuracies, vagueness, figurativeness of thought and language, and other human defects. The investigator should employ the methods of scientific analysis. Cases must be compared. The different elements of these cases must be classified into sorts and the differences and interrelations of the several sorts of facts must be perceived accurately. *When the different sorts of elements involved in our problem and their interrelations, causes, and effects are comprehended, the material questions of law are solved, although the exact application and purport of the term legal possession is not perceived. There remains only the subordinate linguistic question of the technical meaning or meanings of this term.* This question should be answered by scientific methods also, and the process will be expedited greatly by knowledge of the limited functions of language, the way in which words acquire meanings, and the relations between a word in use, the idea directly denoted by the word, and the mentally stored impressions of external phenomena to which the idea is an index. Instances of use should be examined and compared carefully, for often only thus can a clear and definite understanding of the indication of the term be obtained.

[17] See 11 Mich. Law Rev. 1 and 109; 12 Mich. Law Rev. 1; 9 Ill. Law Rev. 98.

Fortunately a large part of the work outlined in the preceding paragraph need not be portrayed in this article. Much of the concrete law of legal possession has been analyzed and recorded in various essays and in parts of treatises on broader subjects of property law. Large fragments of the law of possession have been systematized adequately. The circumstances under which the term is applied are familiar to trained property lawyers. Therefore I need not undertake an exposition of the entire field of legal possession nor an extensive description of particular details. I even may assume that those for whom primarily this article is intended, have considerable knowledge of the subject, and proceed to state the *results* of my analysis, referring for illustration, enlightenment, and support to decided cases, texts, and constantly the knowledge of my readers.

Before we recall some of the details of the law of possession and differentiate and classify certain sorts of elements and their interrelations, let us clarify our views by a little prologue on the linguistic phase of our puzzle.

It is remarkable how much of our thinking is carried on without full consciousness of its purport. We talk glibly of *rights* and *duties,* of *liberty,* of *the State,* of *natural law,* of *consideration,* of *reasonable use,* of *proximate causes* and *remote consequences,* of *vested interests,* of *the law* itself, and we should resent an imputation that we are using words undirected by meaning. Undoubtedly there is something in that mysterious complex called the mind, which such words pretend to communicate; but how many of us ever see or try to see distinctly the indications and implications of our ideas and of our language? Even in reasonably adequate thought, we continually use vague mental figures as symbols or indices to phases of our knowledge and stored impressions, which we thus call to the threshold of consciousness and permit to influence us, but do not drag over the threshold and realize fully through analysis. Hence our language may serve to communicate our thought, but the ideas which our language communicates may not be definitely descriptive of the facts to which mediately they refer. Our ideas may be highly figurative or even merely symbolical. Let me illustrate.

The expression *bonds of matrimony* may be used to indicate briefly the mass of legal and moral obligations which "bind" husband and wife. Rarely, however, will the use of this phrase be accompanied by full comprehension of its import. Before the footlights of the speaker's consciousness is defined the abstract fact that, figuratively, husband and wife are bound to one another by something beyond their own continuous volition. To drag into full mental

light and realize with definiteness all the various things which constitute this binding would require considerable analytical exercise. He signifies them all, without realizing them, by the highly figurative term *bonds of matrimony;* and the abstract concept of a binding rope or, according to his humor, a silken cord, or a chain and manacles, or some other connotation, more or less faded and unemphatic, perhaps occupies symbolically the place of realization in his thought.

Is it not possible that we have instances of such unanalyzed and symbolic ideas implicated with the technical use of the phrase *legal possession?* If we have, the process of determining the nature of the things indicated by the symbolic label should be one of careful, discriminating analysis, not diverted or satisfied by casual attempts of the users at abstract definition. Certainly in the opinions of judges, written as part of the day's work by men of varying intellectual abilities and bents of mind, we cannot reasonably expect to find expressed with constant precision and definiteness a clear, exact analysis of such figurative, very abstract, and symbolic ideas, and a determination of their legal import.

Possession is the status of possessing. *To possess* means primarily *to occupy* physically; but more generally it means *to have* or *to hold* in some sense or other. Many of the senses indicated in use are highly figurative, at least in their origin. For instance we may speak of a man *possessing* a certain good characteristic, or an artistic bent, or a personal liberty. Originally, by a metaphor, the characteristic, or bent, or liberty was conceived as though it were a tangible present thing *possessed* or *held,* although now the metaphor is smothered by common instinctive usage. I take my watch in my hand. I now can say legitimately that I *hold* it or *possess* it, indicating by the verb the voluntary physical control of the watch. This is a primary use of the words. I place the watch in my pocket. Still it may be said that I *possess* or *hold* it; but I hold it in a different sense than when I held it in my hand. No longer do my hands, muscles, and nerves physically and actively control the position of the watch, but it is in a receptacle enclosing it, was placed there by me, and is still physically connected with my person. Therefore in a slightly extended meaning I may say that I still control, *hold,* or *possess* the watch. I take it from my pocket and place it in a drawer of my desk in my room. Still I can say without violating linguistic usage that I *possess* or *hold* the watch. No longer is it physically connected with my person, but it is in a place where I put it and is still potentially subject to my physical control. Again the meaning of the verbs is extended. I go from the room, lock the

door, forget the watch, and lose the keys to room and desk. Temporarily I have lost both control of the watch and the intent to control it. Nevertheless the watch is still among my goods in my house where I placed it. I have not intended to abandon it. If anyone asked the question, I should assert an intention to keep it as mine. No one else has taken it. *Figuratively,* it is within my dominion—within the protection of my house and desk. By a further metaphorical extension one may justify an assertion that I still *possess* or *hold* the watch. I leave the house unguarded and unlocked, and visit a friend twenty miles away. X, a former servant, who knows the location of the watch and other valuables and intends to steal them, enters the house. No one else is within twenty miles or is thinking of the house or its contents. Still linguistic usage would support the statement that I *possess* or *hold* the watch. The same statement might be made legitimately although X were prying open the drawer to get the watch; or after he had broken the lock.[18] When we get this far away from actual physical holding of the chattel, however, we cannot always be certain that particular use of the word is not influenced by the fact that *legal possession* exists. Throughout the history of the watch I have been legally possessed of it. The known fact that the court would maintain my claim to possessory remedies against a tort-feasor and that the judges say in such cases that the plaintiff was legally possessed, might cause and justify linguistically the popular assertion that I *possess* the watch even though otherwise usage would not so speak.[19]

It is possible to imagine indefinitely situations which may be called *possession* without condemnation except from an advocate of a limited definition of uniform elements, or from others, perhaps, on the ground of vagueness of meaning, and which include neither control nor real or apparent power to control, nor a power or apparent power to exclude others, nor an intent to do any of these things. Sufficient has been said, however, to show the spreading tendency of

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[18]Compare: Holmes, *The Common Law,* 237-238.

Pollock and Wright. *Possession in the Common Law,* 4-16.

[19] See Maine, *Ancient Law,* (Pollock's ed.), 281.

"Seisin is possession." 2 Pollock and Maitland, *History of English Law,* (2nd ed.), 29.

"Now in course of time seisin becomes a highly technical word; but we must not think of it having been so always. Few, if any of the terms in our legal vocabulary have always been technical terms. The license that the man of science can allow himself of coining new words is one which by the nature of the case is denied to lawyers. They have to take their terms out of the popular speech; gradually the words so taken are defined; sometimes a word continues to have both a technical meaning for lawyers and a different and vaguer meaning for laymen; sometimes the word that lawyers have adopted is abandoned by the laity. Such for a long time past has been the fate of *seisin.*" 2 Pollock and Maitland, *History of English Law,* (2nd ed.), 31.

language and the futility of attempting to tie the primary realistic meaning of *possession* and its numerous metaphorical uses by a single neat compact definition which shall indicate certain uniform elements inducing its application. The term is too slippery to be confined.[20] Indeed, any pretense of such a definition which escaped the pitfalls of inaccuracy would not itself indicate the varied meanings of particular uses. It would possess the characteristic of all products of excessive attempts at abstraction and generalization. It would be no more definitive, independently of extensive explanation, than is the word *possession* itself used independently of clarifying context or circumstances. The only abstract significance of the term *possession* which we can get from an examination of common usage, is the vague index-notion of *occupying, having,* or *holding* in some sense or other. When we speak of that matter of technical importance, *legal possession,* what is the *holding* to which the word refers? Let us leave this linguistic question unanswered until we have catalogued certain facts of law and noticed certain differences and interrelations in the field of legal possession.[21]

It is now necessary that we enter upon an elementary discussion of certain phases of the law of possession and of titles to interests in land, in order that we may reach some agreement on the central importance of legal possession and its relation to other facts of legal bearing; for otherwise we may not have the same view and perspective of the law, and consequently the purport of my statements may be misapprehended and our thoughts may run in diverse channels. Indeed, much of the appearance of useless technicality in the law of legal possession would vanish and many of its puzzling questions would cease to puzzle if there were less vague abstract talk about *legal title, proprietary right, ownership, right of possession,* etc., without a serious attempt to realize concretely and exactly the nature of the things to which these terms refer and particularly the central importance of legal possession. It is one of the paradoxes

[20] "Yet, as the name of *Possession* is in these and other ways one of the most important in our books, so it is one of the most ambiguous. Its legal senses (for they are several) overlap the popular sense, and even the popular sense includes the assumption of matters of fact which are not always easy to verify." Pollock and Wright, *Possession in the Common Law,* 1.

[21] Realization of the fact that the *non-technical* application of the word *possession* is directed and varied by the casual, imaginative, and imitative usages of every day intercourse and not by careful analytical discrimination, should convince one of the futility of seeking to evolve from the jungle of language a definition of unvariable, abstract "elements" which shall constitute the import of *possession* in a *non-legal* and "proper" or "scientific" sense, and shall form the basis of an analysis and classification of the law of *legal possession.* Detailed knowledge of the law of legal possession should reinforce and emphasize this conviction. Such an attempt, however, is a common one in philosophical discussions of *legal possession.*

of "verbal jurisprudence" and a surprising defect in much really valuable scientific writing on property law that this prerequisite to adequate comprehension of the law of possession either is ignored entirely or is slurred over with vagueness. Let us, therefore, commence by perceiving and distinguishing, as clearly as possible, the different sorts of facts associated with the use of the term *legal possession.* We can do this best by seeing them through the medium of some hypothetical situations.

A piece of land, which for convenience we shall call X, lies unenclosed and unused in one of our western states. All legal rights, liberties, and powers with respect to this land are vested in the federal government, with the exception of the liberties and powers conferred on others by the land laws of the United States.[22] The United States is said to be *legally seised* of the land. The federal government title to its rights, etc., consists of the historical facts giving rise to its pertinent governmental and proprietary powers, etc., including, perhaps, a treaty under which the land was acquired from a foreign government. Smith, acting under the land laws of the United States, and intending to get ultimately a patent, enters on X and complies with the requirements for initiating a claim. Let us assume, for instance, that the land is valuable chiefly for minerals and that Smith validly initiates a lode mining location. He immediately acquires legal possession of the land. He becomes invested with certain sorts of legal rights and liberties which we may call distinctively *possessory rights.* His *title* to these possessory rights consists abbreviately in his acts of initiating, perfecting, and maintaining his valid location under the federal land statutes, and in the existence and authority of those statutes.[23] After the location is perfected, no occupation or use of the land is necessary to keep valid his title to the continuing existence of these rights, unless specifically required by the state statutes or local district mining rules. As long as there is no indication of an intent to abandon the claim and no one initiates an adverse possession or works a forfeiture of Smith's interest and title for failure to perform the required annual labor or some other legitimate reason, Smith retains his legal possession and his possessory rights, etc., although he leaves the claim unoccupied, unused, and unworked and forgets all about

[22] And excepting the power which anyone has, according to the law of many states, to invest himself with legal possessory rights, etc., by entering, occupying, and appropriating.

[23] And the existence, validity, and satisfaction of any pertinent state legislation or mining district rules. See Rev. St. U. S. § § 2322 and 2324.

it in the stress of other business affairs.[24] Let me reiterate for emphasis that neither occupation, nor continued use, nor physical control, nor an actual continuance of his initiatory appropriation intent is an essential of Smith's efficient title to vested legal possession and legal possessory rights.

Here let us pause to answer briefly the question:—What are these possessory rights? To specify them adequately would prolong our discussion to an undesirable extent, but I think that I can give a sufficient general indication in a few sentences. Possessory rights are of two principal types:—(1) *legal defensive rights* or *liberties* and (2) *legal offensive rights* which correlatively are called the *legal duties* of others in favor of the holder of the rights. If within legal limits Smith uses X, if by proper means he physically excludes others from entering upon it or using it, if he takes and disposes of its produce or permits others to do so, if he uses its waters and other resources within legal limits, if he changes its natural features or adds artificial structures in a legally proper way, even if he wastes it or its resources, he thereby commits no legal wrong—i. e. he is subject to no legal liability accrued or contingent, except insofar as he infringes thereby the reserved rights of the United States. This indicates but does not define what is meant by Smith's *possessory defensive rights* or *liberties*. The indication is not comprehensive and it is vague in its implication of the limits of the different concrete liberties which would fall under the group label. For instance, under what circumstances would damage caused others by Smith's use or abuse of X render him legally liable therefore; or what are "proper means" of excluding others? We need not answer such questions here. They usually are dealt with disjointedly and partially in text books and in our law school curricula under numerous disconnected more extensive captions such as *The Natural Rights of a Landowner, Excusable Trespasses, Fixtures, Fructus Naturales and Industriales, Nuisance, Adverse Possession*, etc., etc. *Legal possessory offensive rights* likewise usually are considered partially under the same titles and under others,—e. g. *Trespass to Land, Trespass on the Case, Licenses, and Easements.* If anyone without legal justification or excuse enters on X, or damages it or its unsevered products, or any of the improvements on it, or materially affects the direct physical enjoyment of it or its natural resources in any way, he is legally liable to Smith either immediately or con-

[24] See U. S. Rev. St. § 2322; *Merced Oil Mining Co.* v. *Patterson*, 162 Cal. 358, 365; 122 Pac. 950, 953. Compare *Gemmel* v. *Swain*, 28 Mont. 331, 335, 72 Pac. 662, 663. See also *McFeters* v. *Pierson, et al.*, 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rap. 388; Lindley, *Mines*, (3rd ed.), § § 537-539.

tingently upon the accrual of consequential detriment to Smith. Summarizing inadequately then, we may say that Smith's *legal possessory rights* in X consist (1) of his potential freedom from legal liability for his possible uses or control of X and (2) of the potential legal liabilities of others to him for possible infringements of his use and control of X, trespass on X, use of X, damages to X, etc..

In common parlance Smith has the legal rights of use and control of an owner, except insofar as the reserved rights, etc., of the federal government interfere. Whether or not we shall say that he has a *fee simple* estate in X, is only a matter of language. Certainly it is justifiable to say that he is seised in fee simple, if the phrase is to be applied logically on the basis of essential similarities, for Smith is legally possessed of X, and his alienable property interest in X is indefinitely transmissible to his heirs.[25] It is true, however, that his *title* to this fee is not absolute, and that the maintenance of the security of his title depends on performance of the requirements of the pertinent federal and state legislation and accordant district rules;[26] that the United States also has a property interest in X which limits somewhat Smith's liberties and powers;[27] and that the fulfillment of specified conditions and procedure is necessary before Smith can obtain an unconditional title to his fee and extinguish the interim rights of the United States;[28] but none of these facts militate against calling Smith's interest a fee simple estate. Roughly, his interest and its relation to the federal interest may be compared to the common law estate of a tenant in fee simple, holding in tenure under a lord of the fee on condition subsequent imposed by the lord. Smith's property rights and liberties in X are almost as extensive before he has obtained a patent as they will be after he has obtained one. His *title* to his estate is not as simple and uncon-

[25] Compare: Lindley, *Mines,* (3rd ed.), § § 548-550, and 535 et seq.

[26] See U. S. Rev. St. § § *2322* and *2324*.

[27] The intralimital possessory rights, etc., of a locator of a lode claim are not as extensive as those of a patentee of agricultural land. E. g., according to the better view, a lode locator has no rights, etc., either before or after patent, to lodes within his boundaries whose apexes lie outside of those boundaries. (U. S. Rev. St. § *2322*. *Jones* v. *Prospect Mt. Tunnel Co.,* 21 Nev. 339, 31 Pac. 642; and cf. *Reynolds* v. *Iron Silver M. Co.,* 116 U. S. 687, 6 Sup. Ct. 601, 29 L. ed. 774.) According to some authorities, however, the locator under whose land a lode dips, has possessory rights in the lode against everyone except the possessor of the corresponding apex and extralateral rights, etc., covering it. (See *Duggan* v. *Davey,* 4 Dak. 110, 26 N. W. 887; and dicta in *St. Louis, etc. Co.* v. *Montana Mining Co.,* 194 U. S. 235, 24 Sup. Ct. 654, 48 L. ed. 953.) Then there are restrictions on the scope of a locator's uses of his land before patent in protection of the reserved interest of the United States. See Lindley, *Mines,* (3rd ed.), § 551.

[28] On the importance and effect of a patent for a mining location, see Costigan, *Mining Law,* 392-402.

ditional before patent as it will be after patent, but if we remember and apply the material distinction between the composition of property rights, etc. and the titles on which they depend, the frailties of Smith's title will not mislead our judgment on the nature and proper labeling and classification of his legal interest. Smith has a legal title which is efficient to vest in him his interest, which I would call a fee simple estate, and this title is sufficient also, as long as it is kept unimpaired, *to hold* that estate against legal action by others, including the federal government. The United States has good legal title to its reserved rights, powers, etc.; but both its title and its legal interest are quite distinct from those of Smith.

Now let us leave the history of title to the fee simple in X, and, in order to secure greater freedom in the range of hypothetical questions, substitute a tract of agricultural land, Y; and let us assume that Smith has obtained a valid patent of a fee simple in Y from the United States. Smith may leave Y unoccupied, unenclosed, and unused, and may forget that he owns it, without affecting detrimentally his legal rights, liberties, and powers in Y. His legal possession in fee simple does not depend upon continued occupation, or use, or intent as essential elements of title. As long as no adverse legal possession intervenes, Smith's legal possession exists by virtue of a title consisting of the facts of the former federal title plus the patent and the non-existence of efficient title to adverse legal possession in another.[29]

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[29] See:—*Terpenning* v. *Gallup, et al.*, 8 Ia. 74; *McFeters* v. *Pierson*, 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rep. 388; Pollock and Wright, *Possession in the Common Law*, 24-25; *Brimmer* v. *Long Wharf*, 22 Mass. (5 Pick.) 131; *McLean* v. *Smith*, 106 N. C. 172, 11 S. E. 184; *Hays, et al.* v. *Barrera*, 26 Tex. 79; *Waddle, et al.* v. *Stuart, et al.*, 36 Tenn. 334.

This statement is subject to special qualifications. For instance, it was held in England that, although a transferee under a conveyance operating by force of the statute of uses acquired seisin or possession because of the express provision of the statute to that effect, he could not maintain trespass before entry; and here and there in the authorities one finds other instances of a notion that a previous assumption of occupation or some legally equivalent control or charge of a physical object of property, is a prerequisite to a right of action in trespass for a trespassory dealing with it. (See Pollock and Wright, *Possession in the Common Law*, 56. Compare opinion of "divers justices" in the Anonymous case, Cro. Eliz. 46, cited in a note, ibid. See also Co. Litt. 266b, Butler's note A). Both the general notion and the particular effect of it mentioned above seem to me to be errors induced by a confusion of the ideas of legal possession and physical detention or "actual possession." The action of trespass is a frequently used common law remedy of a legal possessor of a physical object with a present as distinguished from a future estate or analogous interest; and it is denied to one who has custody or occupation, but no sufficient title to vested legal possession (e. g. to a servant occupier, *Mayhew* v. *Suttle, et al.*, 4 E. & B. 347.). Why should prior actual occupation or some legally equivalent physical control be essential to a cause of action in trespass, providing the other necessary elements exist and plaintiff had present legal possession of the land at the time of the tort? See *McGraw, et al.* v.

The facts which compose Smith's efficient title *to the present existence in his favor* of *vested* legal possessory rights, would be efficient as title for another purpose also. They would be sufficient *as a defense* against an attempt by any adverse claimant to get legal possession of Y from Smith by suit. It is important to note clearly these two distinct aspects of the same facts as title, and to emphasize attentively other similar distinctions which I shall make in the course of this article; for not only are they of considerable practical consequence, as should be evident to the naked eye, at least after the development of the next step in the history of property in Y, but unless my readers observe them carefully, they will not appreciate the force of one of my main arguments. I am arguing that it is essential to a scientific knowledge of property law, or of any other branch of the law, that details such as these be examined and analyzed carefully as basic substantial facts of which partially the law is composed, and not merely cursorily noted as curious, relatively unimportant by-products of the "operation of legal rules and principles" or of "legal technic"; for if, in scholastic, centuries-old glorification of the abstract and general as the quintessence of knowledge and the mystic cause of the concrete, we carry the process of abstraction and generalization into obscuring the outlines of important facts and distinctions, or, worse, rest satisfied with *a priori* abstractions and figures of speech as "the law" of a topic, we shall lose thereby the privilege of perceiving clearly and of recording in efficient generalizations the substance and actual interrelations of things in the concrete world of the lawyer's profession. The painstaking scholarship which has been devoted to property law in the past has produced as admirable a mass of learning as has been accumulated in any other legal field, but we have need of the open eyes, simple directness, and careful analytic thought of the true scientist to keep our abilities to use this forest of learning sharpened to thorough efficiency and our pathway of professional progress through it clear of the tangled and confusing underbrush of vague thinking and inadequate language.

The next event of importance in this narrative of the property in Y, is that one Jackson decides to appropriate Y and to hold and con-

Bookman, 3 Hill (S. C.) 265; *Concord* v. *McIntire, et al.*, 6 N. H. 527; *Gillespie* v. *Dew*, 1 Stew. (Ala.) 229.

See, however, and compare Litt. sec. 448, Co. Litt. 266b; Litt. sec. 681, Co. Litt. 358a, 358b; Litt. sec. 7, Co. Litt. 14b et seq; Co. Litt. 29a et seq; 2 Pollock and Maitland, *History of English Law*, (2nd ed.) 59-61; *Dexter* v. *Sullivan*, 34 N. H. 478; Litt. Sec. 58, Co. Litt. 46b; Tiffany, *Real Property*, § 38; *Wheeler* v. *Montefiore, et al.*, 2 Q. B. 133; *Concord* v. *McIntire*, 6 N. H. 527; Litt. Sec. 351, Co. Litt. 218a, 214b; Tiffany, *Real Property*, § 74.

trol it against others. He enters on Y, fences it in, and grazes his cattle over it, using it exclusively. Immediately a radical change is effected in the rights and liberties of Smith and in those of Jackson. Before Jackson's entry Jackson had no liberty against Smith to use Y. He was a tortious trespasser when he entered. He had no rights in Y against anyone—e. g. he could not recover judgment against anyone in litigation for trespassing acts of the defendant or damage done to Y. Now that he has taken control of Y, all this is changed. Jackson now has all the legal possessory rights and liberties constituting a fee simple. He is *seised in fee simple*.[30] His fee is a tortious one. He has not good title *to retain it* against proper proceedings by Smith; but for the present he has it, and *ipso facto* Smith has lost his fee simple. Smith no longer has possessory rights and liberties in Y. He has been *disseised* and *divested of his fee*.[31] If anyone enters upon Y without legal justification or excuse, he is legally liable to Jackson and not to Smith.[32] If the land is damaged unjustifiably, the responsible person is liable to Jackson and not to Smith.[33] Jackson is not presently liable to anyone, not

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[30] "A man may well be seised 'as of fee' though he be not seised 'as of right.' Seemingly we may put the matter thus:—every person who is seised is seised as of fee, unless he has come to his seisin by some title which gives him no more than an estate for life. A disseisor who has, and knows that he has, no right whatever, becomes seised in fee." 2 Pollock and Maitland, *History of English Law*, (2nd ed.) 58.

"But so long as the disseisin continues, the disseisor, or his transferee, possesses all the rights incident to the ownership of an estate in fee simple." James Barr Ames, *The Disseisin of Chattels, Lectures on Legal History*, 177.

See also, opinion of Mulkey, C.J., in *Ft. Dearborn Lodge* v. *Klein, et al.*, 115 Ill. 177, 180 et seq.; Litt. secs. 385, 414, 467; *Asher and Wife* v. *Whitlock*, L. R. 1 Q. B 1; *Leach* v. *Jay*, L. R. 9 Ch. D. 42.

It is common for students to think of the terms *estate for years, life estate, fee tail,* and *fee simple* as denoting *length of duration of enjoyment* of the thing in which the *estate* exists. The element of *length of duration* does enter distinctively into a proper understanding of the things which these terms denote; but an *estate* of any duration consists essentially of an infinite bundle of concrete legal potentialities—i. e., of legal rights, liberties, powers, etc.—and the qualifiers *for life, for years, in fee simple,* and *in fee tail,* denote not only the *duration of these rights, etc.* (when no adverse possession interrupts), but also, less vividly, various other distinguishing characteristics.

[31] Ames, *Disseisin of Chattels, Lectures on Legal History*, 174-177; *Sohier, et al.* v. *Coffin, et al.*, 101 Mass. 179; *Pryor and Fisher* v. *Butler*, 9 Ala. 418.

[32] *Sweetland* v. *Stetson*, 115 Mass. 49; *Nickerson* v. *Thacher*, 146 Mass. 609, 16 N. E. 581; *McColman* v. *Wilkes*, 3 Strob. Law (S. C.) 465, 51 Am. Dec. 637; *Allen* v. *Thayer*, 17 Mass. 299; *Ruggles* v. *Sands*, 40 Mich. 559.

[33] *Illinois, etc. Coal Co.* v. *Cobb*, 94 Ill. 55; *Reed* v. *Price*, 30 Mo. 442; *Rawson* v. *Putnam*, 128 Mass. 552; *Johnson, et al* v. *C. & N. W. Sand and Gravel Co., et al.*, 86 Fed. 269.

See also cases cited in the next note.

Compare: *Rau* v. *Minn. Valley R. Co.*, 13 Minn. 407; *Todd* v. *Jackson*, 2 Dutch (N. J.) 525.

Authorities to the effect that a plaintiff cannot recover full damages for a permanent injury to land which he possesses without establishing "his interest" or that he has "the freehold" or "the title", are not necessarily inconsistent with the particular

even to Smith, for any acts within the limits of the ordinary legal liberties of a land possessor. He is liable to Smith in trespass for the original adverse entry; but during the continuance of the adverse possession he is not liable for any subsequent acts of use or control of Y.[34] Smith's title *to the present existence in his favor of possessory rights* has been vitiated by Jackson's usurpation.

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statement of law to which this note is appended, nor with the general theory which I am presenting.

First, decisions that plaintiff must establish that he has "the freehold" or an interest more durable than that of a tenant for years, at will, or at sufferance, clearly are distinguishable: *I. & G. N. Ry. Co.* v. *Ragsdale,* 67 Tex. 24; *Anderson* v. *Thunder Bay etc. Co.,* 57 Mich. 216. Cf. *Kelley* v. *N. Y. etc. R. R. Co.,* 81 N. Y. 233. See, however, *Rogers* v. *Atlantic, etc. Co.,* 107 N. E. 661.

Second, decisions that in assessing damages in eminent domain proceedings or in an equivalent action in tort against a defendant with eminent domain powers for a permanent injury to plaintiff's land, through defendant's appropriation, the amount may be diminished if claimant fails to establish "title", are also clearly distinguishable; for in such cases the eminent domain appropriator desires and is justified in demanding not merely the vested rights, etc. of use, but also good title and legal power to retain them against all the world in return for full value paid. *Waltemeyer* v. *W. I. & N. Ry. Co.,* 71 Ia. 626.

Third, if in a given jurisdiction, a recovery of full damages by a disseisor would not be a bar to a second recovery against the same defendant by the disseisee *after* reëntry, this is a strong consideration for confining the recovery by the disseisor accordingly. See dicta in *Woods* v. *Banks, et al.,* 14 N. H. 101, 12-13. The better plan on practical as well as precedential grounds, is to permit a full recovery by a disseisor in fee who has not yet been ousted, and to bar a subsequent recovery by the disseisee after reëntry, leaving him his usual recourse against the disseisor. I shall not pause to elaborate the argument in support of this statement, since its truth is sufficiently apparent upon a little reflection over the facts that technical defects in titles are quite common, that a great number of adverse possessors are well on the way towards perfecting their titles under the Statute of Limitations and perhaps never will be disturbed by the "title holder", and that a disseisee has no remedy against the non-possessing tort feasor, at least while the adverse holding continues.

Finally, if the common law of any jurisdiction varies radically in such particular concrete details from that which most of our jurisdictions have inherited from England, let us by all means take care to change accordingly for that jurisdiction the significances and connotations of our technical ideas and terms. They are not technical incantations. They are useful only as carriers of our knowledge and thought concerning external concrete legal causes and effects. Therefore let us load them at all events with definite knowledge of such matters and direct them with intelligence, for ideas and words unencumbered with meaning are more trying in legal communication than the rattling of empty wagons over a rough road.

[34] *Wheeler* v. *Hotchkiss,* 10 Conn. 225; *Raffetto, et al.* v. *Fiori, et al.,* 50 Cal. 363; *Heilbron* v. *Heinlen,* 72 Cal. 371; *Smith* v. *Ingram, et al.,* 29 N. C. (7 Ired.) 175; *Mather* v. *Trinity Church,* 3 S. & R. (Pa.) 508; *Miller* v. *Wesson,* 58 Wis., 831; *Stockwell* v. *Phelps,* 34 N. Y. 363; *Branch & Thomas* v. *Campbell,* 52 N. C. (7 Jones) 378; *Bigelow* v. *Jones,* 10 Pick (Mass.) 161. But see: *Kimball* v. *Lohmas,* 31 Cal. 154.

On the question whether or not the owner, *after recovering his seisin,* can recover specifically for crops and other things, severed from the land during the continuance of the disseisin, as his chattels the authorities are in conflict. See: *Liford's Case,* 11 Co. 51b; *Emerson* v. *Thompson,* 2 Pick. 473; *Roberts Bros.* v. *Hurdle,* 10 Ired (32 N. C.) 490, 51 Am. Dec. 400; *Page* v. *Fowler,* 39 Cal. 412, 2 Am. Rep. 462; *Johnston* v. *Fish,* 105 Cal. 420, 28 Pac. 979, 45 Am. St. Rep. 53; *Stillman* v. *Hamer,* 8 Miss. (7 How.) 421.

Cf:—*Hooser* v. *Hays,* 10 B. Mon. 72; *Branch and Thomas* v. *Campbell,* 52 N. C. (7 Jones) 378.

What rights, etc. has Smith in Y then? He has presently only the rights, liberties, and powers *to recover legal possession* of Y from Jackson or any other person in adverse possession or occupation, by litigation, or within limits, by the self-help remedy of entry—i. e. his rights, etc. are of the sort which we classify under the label *choses in action* in its strictest sense. They are characterized by the usual incidents of *choses in action.* Independently of statute they cannot be "transferred," although an assignment will enable the assignee to sue in the name of his assignor unless the champerty and maintenance statutes prevent.[35] Of course they may be released to the adverse possessor, and in such a release it is not necessary to use words of inheritance, even at common law, to make the release of permanent effect; for the release is not a conveyance in fee, but the voluntary extinguishment of a *chose in action.*[36] Smith's *chose in action* is not devisable as "land, tenements, or hereditaments," but only when covered by some specific description of the Statute of Wills.[37] It is transmissible by intestate succession to the heir of the disseisee, who may prosecute remedies to recover the fee from the disseisor or his successor effectually, but the heir did so as the *post mortem* representative of the disseisee at common law, and it was always the person who at the time when the suit was brought, was the heir of the disseisee, and not the person who was the heir of the disseisee's heir, that was entitled to maintain the action.[38]

On the contrary, the tortious fee of Jackson and the title by virtue of which it is held, are transferable and transmissible, and they are devisable under Statutes of Wills no broader in terms than those of the English statute of Henry VIII and the English Statute of Frauds.[39]

Of course the statements to which this and the preceding notes are appended do not purport to cover the question whether a disseisee is ever entitled to a remedy in equity to prevent irreparable damage to the land during the continuance of the adverse possession.

I do not discuss the remedies of a disseisee, after recovering seisin, for damages for loss of use and occupation and for injuries to the land, since these remedies are irrelevant to the theme of this article.

[35] *Sohier* v. *Coffin,* 101 Mass. 179; *Rawson* v. *Putnam,* 128 Mass. 552; *Jackson* v. *Demont,* 9 Johns. (N. Y.) 55; *Livingston* v. *Proseus,* 2 Hill (N. Y.) 526; *Dever* v. *Hagerty,* 169 N. Y. 481; Maitland, *The Mystery of Seisin,* 2 Law Quart. Rev. 481; Stat. 8 & 9, Vict. c. 106, § 6; Cal. Civ. Code, § 1047; *Jenkins* v. *Jones,* 9 Q. B. D. 128; Ames, *Lectures on Legal History,* 174 et seq.

[36] Litt. secs. 467 et seq.

[37] "A right of entry and action is now everywhere devisable. But until 1838 in England and 1836 in Massachusetts, a disseisee had nothing that he could dispose of by will." Ames, *Lectures on Legal History,* 175; Stat. 32 Hen. VIII, c. 1; Stat. 7, Wm. IV & I Vict. c. 26.

[38] II Black. Comm. 209 et seq; Ames, *Lectures on Legal History,* 175.

[39] *Miller* v. *Bumgardner,* 109 N. C. 412; *Overfield* v. *Christie,* 7 S. & R. 173; *Asher* v. *Whitlock,* L. R. 1 Q. B. 1; *Sawyer* v. *Kendall,* 10 Cush. (Mass.) 241. But see *Garrett* v. *Weinberg,* 48 S. C. 28.

All this constitutes a remarkable transformation in the legal relations of Smith and of Jackson respectively with regard to Y—one which, I think, is beyond the scope of the usual loose discussion of "general property," "ownership," and "legal title," and for which the usual vague definitions of those terms furnish no satisfactory vocabulary. Although the authorities are conclusive on the essential points of these changes, I venture to say that as a coherent and analyzed whole they are unfamiliar to the great majority of lawyers, and even to some teachers and text writers, and that preconceived, *a priori* notions of *property* and *title* will lead many to regard them with distrust and disfavor. Nevertheless, they constitute the core of the law of legal possession of land, and perception of them furnishes a solution of the mystifying puzzle. It is strange, therefore, that abstract discussion of legal possession generally ignores them and never stresses them as distinctly important. The "verbal jurists" dwell with interest on the fact that an adverse possessor has a title which will suffice to recover possession from a subsequent disseisor who ousts him, and even has some procedural advantages over the owner in contests for legal possession; and they puzzle over the question of the proper philosophical reason for this; but here we have a far more interesting and complicated phenomenon than that. Smith, without volition, act, or fault on his part, has ceased to have such multifarious rights, liberties, etc. as constitute what is called usually the "general property" in Y, and Jackson by his aggression has acquired such legal rights, liberties, and powers. If Smith may be said still to have *property* in Y, his *property* is certainly of a very different composition than the vested fee simple which formerly was his property. No lawyer who thinks with perceptions of the actual facts of the law and not principally with the fictional vague mental symbols of the "verbal jurists," can fail to realize this when it is called to his attention.

The determination in definite detail of the rights and liberties *in rem* and the powers of Jackson, of Smith's remedies and how they may be lost, of Jackson's title and how it may be modified so as to lose its effectiveness, of the sorts of circumstances under which such a change in property interests as is typified by this case may occur,—these and numerous related problems concern the fundamental part of our property law. Have we not in them the material for an introduction to the study of the law of property in land comparable to the topics of *offer and acceptance* and *consideration* in contract law? At present this material is in part ignored entirely or only casually noticed, and in part treated in a fragmentary, disjointed, incoherent way in our traditional text books and courses

on property law. Why not begin our study of this labyrinthian field by acquiring clear ideas on those elementary matters of the nature of legal property, the relativity of titles, and the nature and importance of legal possession? At the end of this article I shall give a brief outline of my answer to this question.

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(To be Continued)